بسم الله الرحمن الرحيم

# THE FACE OF MERCY IN ISLAMIC LAW

By Dr Abu Zayd
American Open University

Reviewed by
Muhammad Alshareef

The mantra that Islamic law has no place in modern societies is repeated by modern pundits in subtle, and sometimes, not-so-subtle ways. It is a recurrent theme in the media, frequently interpolated with certain shocking images for maximal effect. Often the images used- including floggings, beheadings and stonings- are taken out-of-context and sometimes from different times, but never matter. The victims almost always are, of course, veiled women. The intended end result is a popular notion that the Islamic penal code is harsh, barbaric and a tool for the suppression of people. All of this is strengthened by attempts by contemporary Muslim individuals to reinterpret Islamic law in the absence of the Sunnah and the understanding of our traditional scholars.

Common to these efforts is a gross ignorance of the complexity, details and aims of the Shari'ah. An objective and penetrating study of the topic would clearly reveal that Islamic law has a benevolent and enlightened side that is too often ignored. It is high time for Muslims to step forward and reclaim the noble role of the Shari'ah in the enlightenment and progress of human society.

Before embarking on an examination of the details of the Islamic penal code, two points stand out most strikingly.

## Punishments Are a Small Portion of Islamic Law

First, Islamic law is *not* equivalent to the hudood punishments. If Islamic law refers to the totality of the Shari'ah, then legal punishments, which may be referred to hence as the penal code, represent only a tiny fraction of the bulk of the Shari'ah. All punishments under Islamic law (referred to in Arabic as *'uqoobaat* عقوبات) fall into three basic categories:

1. Hudood punishments حُدُود
2. Qisas قِصَاص
3. Ta'zeer punishments[1] تَعزِير

The Hudood punishments are those specific crimes whose punishments have been prescribed by Allah in the Qur'an or the Sunnah of His Messenger ﷺ. Their implementation, therefore, is due as a right owed to Allah, and no one has the authority to alter them. They are six in number according to the majority of the scholars:

1. Theft (سرقة *sariqah*)
2. Armed robbery (حرابة *hirabah*)
3. Illicit sexual intercourse (زنى *zina*)
4. Slander (قذف *qazhf*)
5. Consuming intoxicants (شرب الخمر *shurb al-khamr*)

[1] Pg 10. Vol 5. Al-Jazeeri, *Kitab al-Fiqh 'Ala al-Madhahib al-Arba'ah.*

6. Apostasy (ردّة *riddah*).

The inclusion of the last two are subject to some debate, but that does not concern us here. Qisas is the Islamic code dealing with murder. It is *not* equivalent to the death penalty. Murder is a crime whose punishment is an exclusive right of the victim's next-of-kin. The accused can be pardoned, be made to pay blood-money (دية *diyah*) as monetary compensation, or be executed. Interestingly, Islam actually encourages the first option of pardoning.

All other offenses, which obviously represent the vast majority of crimes encountered in society, fall into the final category of Ta'zeer punishments. These are discretionary punishments whose details and implementation have not been clearly spelled out in the Shari'ah, and are left to the rulers and societies to work out.

It is clear, therefore, that punishments form only a small component of Islamic law, and are fixed only for a very limited number of offenses. The constant association of Islamic law with stoning for adultery and amputation for thefts in the modern media is a deliberate effort to misrepresent the true nature of Islamic law. The Shari'ah is not a vindictive, vengeful penal system focused on punishment. On the contrary, it is a comprehensive ethical code that emphasizes the universal values of peace, compassion and forgiveness and seeks to build an ideal society based on its noble ideals. The fact that out of the vast array of crimes known to man, only six- and according to some scholars, four- have been identified by the Shari'ah for fixed punishments is testimony to this fact. The rest of the crimes, which include even murder, are open to arbitration and even pardon by the victims. Where else, can the family of a murdered individual grant clemency and forgive the killer? In contrast, some Western penal systems in modern nations carry a mandatory death penalty for murder.

It is for this reason that the law of Qisas is mentioned by Allah as giving life to the ummah.

﴿وَلَكُمْ فِي ٱلْقِصَاصِ حَيَوٰةٌ يَٰٓأُو۟لِى ٱلْأَلْبَٰبِ لَعَلَّكُمْ تَتَّقُونَ﴾

"Verily there is life in the [law of] qisas for you, O people who understand, so that you may attain piety."[2]

## Avoiding Punishments Preferred

The second point worthy of notice is that Islamic law has certain mechanisms in place to actually prevent the implementation of legal punishments. How many people are aware that the Messenger of Allah ﷺ stated the following?:

[2] Holy Qur'an. Al-Baqarah 179.

ادْرَءُوا الْحُدُودَ عَنْ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ مَخْرَجٌ فَخَلُوا سَبِيلَهُ
فَإِن الْإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ

"Ward off the hudood punishments from the Muslims as much as you can. If there is any possible way for the accused, let him go. For a judge[3] to err in pardon is better than his erring in punishment."[4]

What are some of these mechanisms? Foremost among them are doubts and uncertainties. According to Islamic legal principles, doubts are to be interpreted to the benefit of the accused. The infliction of punishments requires absolute certainty of guilt, and any considerable degree of uncertainty in a case is enough to suspend punishment. As a matter of fact, the Prophet ﷺ actually encouraged his followers to ward off these punishments by looking for these uncertainties:

اِدْرَءُوا الْحُدُودَ بِالشُّبُهَات

"Ward off the hudood with the doubts (*shubuhaat*)."[5]

Maa'iz b. Maalik was person who presented himself to the Prophet ﷺ confessing zina and requesting purification with the hadd. His story is scattered throughout the books of Hadith in numerous narrations. The Prophet ﷺ repeatedly told him to go back and seek Allah's forgiveness. After he kept returning, the Prophet ﷺ made a number of attempts to make sure there was no doubt. He ﷺ sent his Companions to Maa'iz's people to inquire if he was known to be insane. He was informed that there was no evidence of insanity nor was he known to have any defect in his mind. He ﷺ then asked them whether he was intoxicated, and the Companions smelled his mouth and informed him that they could not detect any signs of alcohol on his breath. Only then did the Prophet ﷺ implement the hadd of stoning.[6] In additional narrations of this same story, the Prophet ﷺ asked Maa'iz some specific questions to avert any possible doubt:

لَعَلَّكَ قَبَّلْتَ أَوْ غَمَزْتَ أَوْ نَظَرْتَ قَالَ لَا قَالَ أَنِكْتَهَا قَالَ نَعَمْ قَالَ فَعِنْدَ ذَلِكَ أَمَرَ بِرَجْمِهِ

"Perhaps you only kissed her or flirted with her or gazed at her." Maa'iz replied, "No." He ﷺ then asked, "Did you have physical intercourse with her?" He replied, "Yes," and only then was he ordered to be stoned.[7]

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[3] The term used is *imam*, or leader of the state, but it has been interpreted by jurists to include judges as the separation of political and legal authority occurred early in Islamic history.
[4] Narrated by Al-Tirmidhi #1344 with a weak chain. However, all jurists have accepted this hadith and used it in their works on the basis of other chains that strengthen it. Categorized as authentic (*saheeh*) by al-Hakim.
[5] Musnad Abu Hanifah. Also narrated as a mawqoof tradition (statement of a Companion) by Ibn Hazm and others. See al-Mubarakpuri (d. 1353H), *Tuhfah al-'Ahwadhi bisharh Jami' al-Tirmidhi.*
[6] Muslim #3207, Ahmad #21864, Darimi #2217.
[7] Bukhari #6324, Ahmad #2022, Abu Dawud #3842.

Also among the mechanisms to ward off Islamic punishments is the concept of concealment and clemency. This is a remarkable feature of the Islamic legal system that is deliberately ignored. Islam in general promotes forgiveness and compassion as important qualities of believers. The Qur'an commands:

﴿ خُذِ ٱلْعَفْوَ وَأْمُرْ بِٱلْعُرْفِ وَأَعْرِضْ عَنِ ٱلْجَٰهِلِينَ ﴾

"Hold on to forgiveness."[8]

The Prophet ﷺ encouraged the concealment of one another's faults and offenses in the spirit of forgiveness:

وَمَنْ سَتَرَ مُسْلِمًا سَتَرَهُ اللهُ فِي الدنيا وَالْآخِرَةِ

> "Whoever conceals [the faults, offenses] of a Muslim, Allah will conceal his in this world and the Hereafter."[9]

Conversely, the Qur'an condemns those who love to see scandal and controversy propagate in society:

﴿ إِنَّ ٱلَّذِينَ يُحِبُّونَ أَن تَشِيعَ ٱلْفَٰحِشَةُ فِى ٱلَّذِينَ ءَامَنُوا۟
لَهُمْ عَذَابٌ أَلِيمٌ فِى ٱلدُّنْيَا وَٱلْءَاخِرَةِ ۚ وَٱللَّهُ يَعْلَمُ وَأَنتُمْ لَا تَعْلَمُونَ ﴾

> "Those who love to see scandal broadcast among the believers will have a grievous penalty in this life and in the Hereafter. Certainly Allah knows and you do not."[10]

With regard to legally punishable offenses, clemency is unconditionally the superior option as well. Muslims are clearly encouraged to forgive each other and repent for their offenses, even those calling for hadd punishments, without resorting to the legal authorities. It was the practice of the Prophet ﷺ to encourage repentance and concealment whenever he heard of an offense that was committed by the believers. Once the hadd offense does reach the judge, however, its punishment must be enforced, for the hudood are rights owed to Allah (*huqooq Allah*). The Prophet ﷺ stated:

تَعَافُوا الْحُدُودَ فِيمَا بَيْنَكُمْ فَمَا بَلَغَنِي مِنْ حَد فَقَدْ وَجَبَ

[8] Holy Qur'an. 7:199.
[9] Muslim #4867, Tirmidhi #1843, Abu Dawud #4295, Ibn Majah #221, Ahmad #7118.
[10] Qur'an 24:19.

> "Forgive the hudood among you. But should a hadd case reach me, punishment is certain."[11]

In the case of Maa'iz, it became known that he had confessed to the Prophet ﷺ after being encouraged by his friend Hazzal al-Aslamy. After the infliction of the punishment, the Prophet ﷺ sadly told Hazzal:

وَيْحَكَ يَا هَزالُ لَوْ سَتَرْتَهُ يَعْنِي مَاعِزًا بِثَوْبِكَ كَانَ خَيْرًا لَكَ

> "Woe to you, O Hazzal. If you had veiled him with your mantle it would have been better for you."[12]

This spirit of forgiveness and concealment stands in sharp contrast to the broadcast image of religious police scouting Muslim societies for offenders to punish. Is it deliberate misinformation and exaggeration or real ignorance and extremism among segments of the Muslim society? Perhaps the blame lies somewhere in between.

## Precise Definitions of Offenses

This introductory discourse now allows us to focus in on the hudood offenses. It must be noted at the outside that the definitions of these offenses are not vague and nebulous, subject to the whims and interpretations of religious leaders. They are clear and precise, and easily found in all classical legal texts. Let us survey the exact definitions of various hadd crimes found in one classical work of comparative fiqh: Al-Jazeeri's *Kitab al-Fiqh 'Ala al-Madhahib al-Arba'ah* (The Book of Fiqh According to the Four Legal Schools).

Theft (*sariqah*) is defined as:

أخذ العاقل البالغ نِصاباً محرزاً ، ملكاً للغير على وجه الخفية

> the taking of another person's belonging, of a value exceeding the minimum quantity, from its usual place of custody by a sane, mature individual in a stealth manner.[13]

*Sariqah* clearly must involve the taking of the property in stealth and does not apply to the forceful taking of property or goods, which would constitute an entirely different crime. In addition, it must involve taking the property from the clear custody of its owner and not in some public place. Finally, the perpetrator must be sane and of discernable age.

Slander (*qadhf*) is:

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[11] Abu Dawud #3804, al-Nisa'i #4803.
[12] Ahmad #20890, Malik #1290, Abu Dawud #3805.
[13] Pg 127. Vol 5. *Kitab al-Fiqh*. Some portions of the definition have been excluded for brevity.

نسبة من أحصن إلى الزنا صريحاً

the clear accusation of zina involving a chaste person.[14]

It cannot apply to mere cursing or the use of unambiguous terms that can be construed to imply zina. It is the specific allegation of illicit sexual intercourse without adequate proof.

Zina is defined in another fiqh text as follows:

وطء الرجل المرأة في القبل في غير الملك و شبهته

> Sexual intercourse between a man and woman in the woman's vagina without legal right or the semblance of legal right.[15]

It is explicitly defined as illicit sexual intercourse between unlawful partners. It does not include any other type of sexual activity. In fact, the Arabic definition includes the portion *in the woman's vagina* so as to leave no room for doubt. All other forms of sexual relations apart from intercourse, while they may be wrong and immoral, could never be subject to the hadd punishment for *zina*. At most, they could be subject to discretionary punishments determined by society.

## Stringent Conditions for Establishing Guilt

Furthermore, the implementation of these hudood punishments are subject to such stringent conditions that they sometimes appear to be only symbolic in nature, while serving at the same time an effective deterrent value. The most remarkable example is the crime of *zina,* which must be established by four witnesses to the actual act of penetration. Even if three trustworthy people witness the act of zina in broad daylight, they are not sufficient to establish guilt! In fact, they would be charged with slander under Islamic law and punished for failure to provide adequate proof for the charge of zina.

Also, the crime of theft is only punishable if it reaches a certain minimum value and if it is clearly taken from the possession of its owner (from its usual place of custody, or *hirz*). It would not apply if an item was found on the street or in an unusual or public location.

A general condition that applies to all of the hudood, and indeed all Islamic punishments, is that the perpetrator must be sane (*'aqil*) and of mature age (*baligh*). Punishments cannot be applied to minors or those suffering from disabling

[14] Pg 171. Vol 5. *Kitab al-Fiqh*.
[15] Pg 5349. Al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu*. Dar al-Fikr. Damascus, Syria. 1997. Original definition referenced from *Hashiyah Ibn 'Abideen*. Vol 3, pg 154.

mental illnesses that compromise their capacity to discern between right and wrong. We have already the seen the case of Maa'iz, where the Prophet ﷺ tried in vain to ascertain from the people of Maa'iz whether he was known to suffer from any mental defects in order to ward off his punishment.

## Flexibility of Discretionary Punishments

The fact that the vast majority of crimes are subject to *Ta'zeer*, or discretionary, punishments left to be determined by individual societies according to local custom, allows for a tremendous range of flexibility in the development of a penal system. It is remarkable that out of the myriad of possible crimes and offenses that may be committed by human beings, Allah chose to single out only a miniscule few for mandatory punishment (six according to most scholars, four according to others), and even those under certain conditions. The remaining offenses, which clearly would form the majority in any legal system, are left open to ta'zeer punishments.

## Worldly Punishments are an Atonement

Finally, if we look at the raison d'etre of the hudood punishments from a strictly moral-religious perspective, we find that they are actually atonement for the sins of the subject and not a punishment inflicted in retaliation for the crime. The criminal clearly has the option of concealing his crime and personally repenting to Allah, or presenting himself to the authorities for judgment. In the latter case, Muslim jurists agree that the implementation of a hadd punishment is atonement for the sins of the subject, and that person is *not* punished in the Hereafter again. As Imam al-Jazeeri writes in his work:

فإقامة الحدود على من وقع فيها تكفر ذنبه ، و ترفع عنه العقاب فى الدار الآخرة ،
لأن الله تعالى لا يجمع على عبده عقابين على ذنب واحد

> "The establishment of the hudood on a person atones for his sins, and his punishment in the Hereafter is lifted from him because Allah does not combine two punishments in a person for a single crime."[16]

This principle is based on numerous Prophetic narrations to this effect. Among them are the following:

مَنْ أَصَابَ ذَنْبًا فَعُوقِبَ بِهِ فِي الدنْيا فَالله أَكْرَم مِنْ أَنْ يُثَنيَ الْعُقُوبَة عَلَى عَبْده فِي الْآخِرَة

[16] Pg 107. Vol 5. *Kitab al-Fiqh 'Ala al-Madhahib al-Arba'ah.*

> "Whoever commits a sin and is punished for it in this world, then Allah is too generous to repeat the punishment on His slave in the Afterlife."[17]

The venerable Companion Ubadah b. Samit relates the details of the great pledge of allegiance that was taken by a group of dignitaries of Madinah at the hands of the Messenger of Allah ﷺ at Aqabah:

حَدثَنَا أَبُو الْيَمَان قَالَ أَخْبَرَنَا شُعَيْبٌ عَنْ الزهْرِي قَالَ أَخْبَرَنِي أَبُو إِدْرِيس عَائِذُ اللهِ بْنُ عَبْدِ اللهِ
أَن عُبَادَةَ بْنَ الصامِتِ رَضِيَ اللهُ عَنْهُ وَكَانَ شَهِدَ بَدْرًا وَهُوَ أَحَدُ النقَبَاءِ لَيْلَةَ الْعَقَبَةِ
أَن رَسُولَ اللهِ صَلى اللهُ عَلَيْهِ وَسَلمَ قَالَ وَحَوْلَهُ عِصَابَةٌ مِنْ أَصْحَابِهِ بَايِعُونِي عَلَى
أَنْ لَا تُشْرِكُوا بِاللهِ شَيْئًا وَلَا تَسْرِقُوا وَلَا تَزْنُوا وَلَا تَقْتُلُوا أَوْلَادَكُمْ وَلَا تَأْتُوا بِبُهْتَانٍ
تَفْتَرُونَهُ بَيْنَ أَيْدِيكُمْ وَأَرْجُلِكُمْ وَلَا تَعْصُوا فِي مَعْرُوفٍ
فَمَنْ وَفَى مِنْكُمْ فَأَجْرُهُ عَلَى اللهِ وَمَنْ أَصَابَ مِنْ ذَلِكَ شَيْئًا فَعُوقِبَ فِي الدنْيَا فَهُوَ كَفارَةٌ لَهُ
وَمَنْ أَصَابَ مِنْ ذَلِكَ شَيْئًا ثُم سَتَرَهُ اللهُ فَهُوَ إِلَى اللهِ إِنْ شَاءَ عَفَا عَنْهُ وَإِنْ شَاءَ عَاقَبَهُ فَبَايَعْنَاهُ عَلَى ذَلِك

> "Ubadah b. Samit, who had witnessed Badr and was one of the dignitaries on the night of the pledge of Aqabah, relates that the Messenger of Allah ﷺ said surrounded by group of his Companions, 'Pledge to me that you will not associate any partner with Allah, nor steal, nor commit zina, nor kill your children, nor utter slander intentionally forging falsehood, nor disobey me in what is good. Whosoever fulfills this pledge then the reward is with Allah. And whoever fails in any way and *is punished in this world*, *then that is expiation for him*. Whoever fails [to fulfill his pledge] in any way and Allah conceals it for him, then it is up to Him to forgive Him if He wills or punish him if He wills.' And they pledged to him ﷺ."[18]

The great commentator of Saheeh Bukhari Ibn Hajr al-Asqalani writes in concluding the discussion of the above hadith:

وَيُسْتَفَاد مِنْ الْحَدِيث أَن إِقَامَة الْحَدّ كَفارَة لِلذنْبِ وَلَوْ لَمْ يَتُبْ الْمَحْدُود , وَهُوَ قَوْل الْجُمْهُور

> "From this hadith [the ruling] is deduced [the principle] that the establishment of a hadd punishment is an expiation for the sin, even if the subject did not repent. And that is the majority view."[19]

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17 Tirmidhi, Tabarani. Classified as authentic by al-Hakim. See Fathul-Bari, commentary of Hadith #18.
18 Bukhari #17, Muslim #3223, Tirmidhi #1359, Nasa'i #4091, Ahmad #21616, Darimi #2345.
19 Fathul-Bari, commentary of Hadith #18.

A woman came to the Prophet ﷺ and voluntarily confessed of zina and sought to be purified of her sin. When she persisted in her demands despite the Prophet's ﷺ urging her to go back and seek Allah's forgiveness, she was ordered to be stoned.

Afterwards, the Prophet ﷺ prayed the funeral prayer over her. When Umar asked him why he was praying over an adulteress, the Prophet ﷺ replied:

لَقَدْ تَابَتْ تَوْبَةً لَوْ قُسِمَتْ بَيْنَ سَبْعِينَ مِنْ أَهْلِ الْمَدِينَةِ لَوَسِعَتْهُمْ
وَهَلْ وَجَدْتَ تَوْبَةً أَفْضَلَ مِنْ أَنْ جَادَتْ بِنَفْسِهَا لِلهِ تَعَالَى

> "Verily, she made such a tawbah (repentance) that if it were to be divided among seventy of the people of Madinah, it would suffice. Can you find a better repentance than that she gave her own self to Allah the Exalted?"[20]

Thus we can see that the aim of Islamic punishments is two-fold: reformation of the individual in addition to deterrence of crime in society. Indeed, the focus of all ordinances in Islam is the reform and betterment of individuals, societies and nations.

## Barbaric Penalties?

In the final analysis, however, the problem for many lies in the nature of some of the hudood punishments. Sadly, even many Muslims have some difficulty coming to grips with them. To be perfectly fair, though, the notion of the barbaric nature of stoning, amputation and flogging must be placed in proper perspective. Can we really say that execution by beheading is more barbaric than, say, frying the brain with massive doses of electricity or the injection of lethal substances that induce suffocation? Is amputation or flogging more barbaric than locking individuals in mass institutions in often subhuman conditions?

Punishments by their very nature are unsettling. However, they are a necessary tool to allow us to live in a world where crime and evil exist. If we look at the tremendous deterrent value of these punishments coupled with their very rare implementation, and the resultant stability and order that results from them, we can conclude that, though harsh is some aspects, they are indeed a mercy to human society. Ibn Taymiyya makes a brilliant parallel between their enforcement and the father's disciplining of his child.

بمنزلة الوالد إذا أدّب ولده فإنه لو كف عن تأديب ولده ، كما تشير به الأم رقة و رأفة ،
لفسد الولد ، و إنما يؤدّبه رحمة به و إصلاحاً لحاله

[20] Muslim #3209, Tirmidhi #1355, Nasa'i #1931, Abu Dawud #3852, Ahmad #19015, Darimi #2222.

[The hudood punishments] are like the father who punishes his child. If he ceases to do so, at the beckoning of the child's mother due to he softness and leniency, the child would become corrupt. Verily the father punishes his son out of mercy to him and to rectify his state.[21]

## Conclusion

This in sum is a cursory review of some key elements of the Islamic law that should be sufficient to convince the reader that the Shari'ah has been unfairly depicted to a significant degree in our times. The image that is deliberately portrayed is one that stands in sharp contrast to the true spirit and aim of the Shari'ah. That true spirit is not a concoction of contemporary scholars attempting to defend Islam and project it in a more sympathetic way. It is a spirit that has always been duly noted by all great classical scholars of Islam, as Ibn Taymiyya states:

فينبغي أن يعرف أن إقامة الحدود رحمة من الله بعباده ، فيكون الوالي شديداً في أقامة الحد ، لا تأخذه رأفة في دين الله فيعطله ، و يكون قصده رحمة الخلق بكف الناس عن المنكرات

It deserves to be known that the establishment of the hudood is a mercy from Allah towards His servants, and the leader must be strict in their enforcement, not allowing leniency in the religion of Allah to affect him, keeping in mind the goal of mercy to creation, by protecting humanity from evil.[22]

Unfortunately, those who have studied it in any real depth are far too few to counter the increasingly virulent anti-Islamic wave that is engulfing the world today. The world desperately needs a deeper understanding of its noble heritage that once shaped the destiny of nations and civilizations.

[21] Pg 5316. Al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu*. Dar al-Fikr. Damascus, Syria. 1997. Original quotation from Ibn Taymiyya's *al-Siyasa al-Shar'iyah*.
[22] Pg 5316. Al-Zuhayli, *Al-Fiqh al-Islami*.

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